To be sure, the officials have "qualified immunity," but this immunity from suit does not and should not protect an official when "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).[8]

For FSIS inspectors, there have been two cases that recognized a *Bivens* remedy. In the first, *Krusinski v. United States Department of Agriculture*,[9] the Sixth Circuit recognized that a *Bivens* remedy against inspectors in their individual capacity could be sought on the basis of harassment of the owner due to his ethnicity.

In the second, *The Veal Connection v. Thompson*,[10] the company filed a *Bivens* suit against several FSIS officials, including the inspectors and the inspectors' supervisors. The regulatory actions taken against the company were alleged to have been taken to retaliate against the company for registering complaints with congressional representatives and senior administration officials. The District Court, discussing the qualified immunity claim, found that "No reasonable officer could have believed that he or she could retaliate for the exercise of First Amendment rights."[11]

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[8] In the instant case, the issue before the Eighth Circuit involved the issue of qualified immunity – that court, *sua sponte*, decided that no *Bivens* action would lie, mooting the qualified immunity issue.

[9] 4 F.3d 994 (Table) (Unpublished Disposition) (provided in Nebraska Beef's petition at 78a).

[10] (Unpublished Decision) (provided in Nebraska Beef's petition at 89a).

[11] *Id.* at 117a.

Moreover, there seems to be no doubt on the part of FSIS itself that its inspectors and other officials are subject to *Bivens* lawsuits. On May 18, 2004, the USDA issued a final regulation (without prior notice) to establish a regulation authorizing indemnification of its employees. *See* 69 Fed. Reg. 28041.[12] It would seem that if the agency charged with enforcement of the FMIA has not questioned the applicability of a *Bivens* remedy, the principle is well established.

1. FSIS-Inspected Establishments Require the Availability of a *Bivens* Remedy to Protect Their Constitutional Rights and to Assure an Unbiased Relationship with Their Inspectors

As discussed above, the in-plant inspector wields considerable power over the life of an establishment. He or she can stop operations or reject product, regardless of a business necessity to ship product. In the event the inspector is motivated by an intent to retaliate against the establishment because the establishment had appealed a previous decision, there is little a company can do. It cannot ignore the inspector's regulatory action; to do so is illegal. The company can appeal the action, but as discussed above, appeals may not provide timely relief, even assuming the supervisor will not defer to the inspector's characterization of the non-compliance.

The purpose of a *Bivens* remedy is to provide relief in limited instances when government officials have exceeded

[12] The contact identified in the Federal Register Notice is the Assistant Administrator of FSIS.

their authority in egregious ways that violate citizens' constitutional rights. There have been few *Bivens* actions against FSIS inspectors because typically those officials act within the parameters of their authority and the law. Nonetheless, as noted by this Court in *Butz v. Economou*, the presence of a *Bivens* remedy "deter[s] federal officials from committing constitutional wrongs." 438 U.S. at 505.

In short, without a *Bivens* remedy, inspectors wield unfettered power over the establishments they oversee. The availability of a *Bivens* remedy serves as a limited check on inspectors that deters against retaliation for an establishment's exercise of its constitutional rights.

2. A *Bivens* Remedy for FMIA Cases Is Permitted by the FMIA, Acknowledged by USDA and Desired by Establishments to Preserve Their Constitutional Rights

Given there is a dispute among the circuits on whether a *Bivens* remedy applies to protect meat establishments from inspector retaliation when exercising their First Amendment rights, the Petitioner has requested that this Court issue a writ of certiorari. Mindful that this Court is wary of extending *Bivens* remedies into new contexts, *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988), the *Amici* respectfully submit that such a remedy is essential for the fair operation of the Federal Meat Inspection Act and that such a remedy has been applied previously in this context. No factor identified by the Eighth Circuit negates such a conclusion.

First, the absence of congressional authority is not determinative. Relying on the analysis of this Court in *Butz v. Economou*, in the absence of congressional authority, a

court may "think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages and whether the courts are qualified to handle the types of questions raised by the plaintiff's claim." *Id.* at 503 (citations omitted). On the type of injury, the *Amici* are concerned about the very loss of a business, which is an irreparable injury. *C & K Manufacturing v. Yeutter*, 749 F. Supp. 8 (D.D.C. 1990). As regards the questions which may be posed in a *Bivens* case involving the FMIA, the question is not whether an incident constituted non-compliance, but whether the establishment's exercise of its First Amendment right was a "substantial" or "motivating" factor that caused the inspector's conduct. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). The courts are more than qualified to handle such motivation inquiries.

Second, the regulatory scheme of the FMIA, with its right of appeal, is not always conducive to resolving problems caused by a rogue inspector. When an establishment is closed or when product is spoiling or when livestock are standing in the temporary holding pens waiting to be processed on a cold January day, appeal of the in-plant inspector's action may not be a viable alternative. Moreover, since many decisions are based on the condition of product or the establishment, which are not and most often cannot be viewed by the supervisory personnel, the rogue inspector's description governs, thus negating an independent (and unbiased) review.

Third, the exhaustion provision cited by the court below, 7 U.S.C. § 6912(e), is not determinative because, for the reasons discussed above, that provision is not applicable to a *Bivens* remedy. By its terms, the provision applies to administrative appeal provisions established by law or

by the Secretary. The FMIA does not provide any administrative procedures for the conduct here.[13] Moreover, the "Uniform Rules of Practice" established by the Secretary only permit complaints for violation of the statutes administered by the Secretary.[14] A *Bivens* remedy does not involve violation of a statute administered by the Secretary, but violation of the Constitution. Indeed, should the Secretary have wanted to adopt some administrative proceeding to deal with a Bivens action, he or she could have done so in conjunction with the promulgation of the regulation governing indemnification for *Bivens* suits, 7 C.F.R. § 1.1501. Moreover, in the only case addressing this section, the court found that § 6912(e) was not a jurisdictional prerequisite, at least in the case of a bankruptcy proceeding. *See In re Cottrell*, 213 B.R. 33 (MD Ala. 1997).

[13] The only administrative procedure mentioned in the FMIA deals with withdrawal of inspection if the establishment or a responsible individual has been convicted of certain crimes. *See* Section 401 of the FMIA, 21 U.S.C. § 671.

[14] Specifically, any person may request an administrative proceeding "regarding an apparent violation of any provision of a statute (administered by USDA) or any regulation, standard, instruction, or order issued pursuant thereto." 7 C.F.R. § 1.133(a)(1).

IV. CONCLUSION

As argued by the Petitioner, and supported by the additional foregoing reasons, the *Amici* respectfully request that this Honorable Court grant Petitioner's petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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In The

Supreme Court of the United States

NEBRASKA BEEF, LIMITED,

Petitioner,

v.

DENNIS GREENING, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR REHEARING FROM DENIAL OF PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR REHEARING FROM DENIAL OF PETITION FOR A WRIT OF CERTIORARI

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on May 1, 2006, and (2) granting the petition. In the alternative, petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on May 1, 2006, and (2) granting the petition and remanding the matter to the Eighth Circuit for proceedings consistent with this Court's opinion in *Hartman v. Moore*, No. 04-1495 (U.S. Argued Jan. 10, 2006, decided Apr. 26, 2006). As grounds for this motion, petitioner states the following:

I. This Court's stance regarding the scope of a qualified immunity appeal announced in *Hartman v. Moore*, No. 04-1495 (U.S. Argued Jan. 10, 2006, decided Apr. 26, 2006), further exposes the error made by the Eighth Circuit and thus, there still exists an unresolved and uncertain area of law on which circuit courts differ.

This Court recently added to its precedent surrounding the scope of appellate jurisdiction when interlocutory appeal is taken of a denial of qualified immunity pursuant to *Mitchell v. Forsythe*, 472 U.S. 511 (1985). In *Hartman*, this Court considered whether a *Bivens* plaintiff, in a retaliatory-prosecution action, must plead and prove the absence of probable cause for pressing the underlying criminal charges. *Hartman*, No. 04-1495, slip op. at 6. In a footnote, this Court noted Moore's contention that appellate jurisdiction was exceeded when the appellate courts looked at the probable cause issue. *Id.* at n.5. However, this Court correctly noted that the issue simply raised the question of what elements must be pled and proven in

order to win. *Hartman*, No. 04-1495, slip op. at 6 n.5. In fact, this Court made itself very clear that "our holding does not go beyond a definition of an *element* of the tort, directly implicated by the defense of qualified immunity and properly before us on interlocutory appeal." *Id.* (*emphasis added*).

Unlike the situation presented in *Hartman*, the Eighth Circuit in this case did not simply determine that Nebraska Beef neglected to plead an essential element of its cause of action. Rather, the Eighth Circuit completely bypassed any determination of the contours of the cause of action: the constitutional violations alleged to have been violated and whether a reasonable inspector would have been aware of the constitutional rights alleged to have been violated. Instead it chose to exercise jurisdiction to find that *no* cause of action existed at all, thus obviating the need to even address any aspect of the qualified immunity defense being appealed. Clearly, such a holding goes "beyond a definition of an element of the tort." *See Hartman*, slip op. at 6, n.5.

The finding of proper jurisdiction in *Hartman* only underscores the error made by the Eighth Circuit in the pending case. The Eighth Circuit's decision to consider the availability of a *Bivens* remedy directly contradicts the precedent established by this Court in *Hartman* as well as *Siegert v. Gilley*, 500 U.S. 226 (1991), *Johnson v. Jones*, 515 U.S. 304 (1995) and *Behrens v. Pelletier*, 516 U.S. 299 (1996). Accordingly, this Court could grant this Petition and remand with instructions to the Eighth Circuit to enter an order consistent with *Hartman* and its other precedent.

Furthermore, *Hartman* underscores the need for clarification of the scope of an interlocutory appeal under

Mitchell. In addition to the Tenth Circuit (*Hill v. Dep't of the Air Force*, 884 F.2d 1321 (10th Cir. 1989)[1]), the Eighth Circuit not only differed with Supreme Court precedent, but it directly brought itself at odds with the established law of the Ninth Circuit (*Kwai Fun Wong v. U.S.*, 373 F.3d 952 (9th Cir. 2004)) and the Third Circuit (*Triad Associates, Inc. v. Robinson*, 10 F.3d 492 (7th Cir. 1993)). Indeed, since the original Petition was filed, the Ninth Circuit has reaffirmed its conformance with Supreme Court precedence and divergence from the Eighth Circuit's *Nebraska Beef* decision in *Sissoko v. Rocha*, 440 F.3d 1145 (9th Cir. 2006). There the Ninth Circuit noted that "the existence of a *Bivens* remedy is not jurisdictional." *Sissoko v. Rocha*, 440 F.3d at 1154 (9th Cir. 2006) *citing*, *Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1082-84 (8th Cir. 2005).

II. The denial of a *Bivens* remedy against USDA employees presents an issue of independent importance and should be considered by this Court because of its reaching national implication and the Eighth Circuit's departure from precedent in denying Nebraska Beef the remedy afforded by other circuit courts.

Even assuming the appropriateness of the Eighth Circuit's exercise of expanded jurisdiction on a *Mitchell*-type

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[1] In its opinion, the Eighth Circuit cited *Hill* as support for its extension of jurisdiction. *See Nebraska Beef*, 398 F.3d at 1083-84 (also citing *Merritt v. Shuttle, Inc.*, 187 F.3d 263 (2nd Cir. 1999), though the correlation between the Eighth Circuit's ruling and *Merritt* is less direct because the Second Circuit seemed to utilize an amalgamation of law on interlocutory jurisdiction and it specifically disclaimed reaching the issue of the *Bivens* allegations brought therein. *See Merritt*, 187 F.3d at 266 n.2).

appeal, petitioner presents the important issue of whether a *Bivens* cause of action is available against individual USDA inspectors. The Eighth Circuit now specifically prohibits a *Bivens* cause of action against USDA inspectors for their unconstitutional conduct in carrying out their official duties. Other courts have allowed such actions to be brought. Allowing this disparity among the courts does not allow for the uniform enforcement of laws.

As noted in petitioner's original petition and the brief of *amici curiae*[2] this Court has previously allowed a *Bivens* cause of action in the context of a suit against individual employees of the USDA in *Butz v. Economou*, 438 U.S. 478 (1978). Likewise, the Sixth Circuit has specifically allowed a suit against the same class of Food Safety Inspection Services employees at issue in this case. *See Krusinski v. USDA*, 4 F.3d 994 (Table) 1993 WL 346858 (6th Cir.) (unpublished) (reproduced in Nebraska Beef's petition at 78a).

Similarly, since the time of the original petition filed by Nebraska Beef this Court, under *Hartman*, has allowed a *Bivens* claim against federal postal inspectors. Additionally, the Tenth Circuit has held that a *Bivens* remedy is available against other federal government actors. Specifically, in *Robbins v. Wilkie*, 433 F.3d 755 (10th Cir. 2006), the court allowed a *Bivens* suit against individual employees of the Bureau of Land Management. The Tenth Circuit specifically noted that the Administrative Procedures Act ("APA") did not preclude a *Bivens* suit to redress individual actions unrelated to final agency action. Conversely,

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[2] Submitted on behalf of the National Meat Association, American Meat Institute, American Association of Meat Processors, Southwestern Meat Association, and Eastern Meat Packers Association.

the Eighth Circuit below disallowed this *Bivens* suit, in part, because it found that the APA provided an adequate remedy for Nebraska Beef. *See Nebraska Beef, Ltd. v. Greening*, 398 F.3d at 1084. This disparity showcases the uncertainty of the circuit courts as to the nature of *Bivens* claims and their availability to those regulated by federal agencies.

CONCLUSION

For the foregoing reasons, as well as those contained in the petition for writ of certiorari and in the brief of *amici curiae*, the petition for rehearing should be granted, the petition for writ should be granted and petitioner respectfully requests this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Alternatively, petitioner respectfully requests that the petition for rehearing be granted, the petition for writ of certiorari be granted and this Honorable Court remand this matter for further proceedings consistent with its opinion in *Hartman*.

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CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

William M. Lamson, Jr.